REL: JULY 8, 2022

Alabama Court of Criminal Appeals

OCTOBER TERM, 2021-2022

CR-20-0645

India Vanet Nelson

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC-19-3555)

KELLUM, Judge.

The appellant, India Vanet Nelson, was convicted of murdering 15-year-old Jackory Smith by shooting into an occupied dwelling, an offense

defined as capital by §13A-5-40(a)(16), Ala. Code 1975.[1] Nelson was sentenced to life imprisonment without the possibility of parole.[2]

Facts and Procedural History

The State's evidence tended to show that on December 24, 2018, Nelson and Rory Smith drove to the Carondolet Apartments ("the apartments") in Mobile and Nelson fired into an apartment occupied by Cedrick Williams and Johnesia Salter. Johnesia's brother, Jackory, was sleeping on a sofa and was shot in the neck. Dr. Eugene Hart, a medical examiner for the Alabama Department of Forensic Sciences, testified that the bullet entered Jackory's anterior right neck and "traveled through the soft tissues of the neck and impacted where the vertebral column and the skull intersect." (R. 742.) The cause of Jackory's death, Dr. Hart testified, was the gunshot wound to his neck. (R. 746.)

[1]The victim's name is spelled "Jackory" and "Jakory" in various portions of the record and in the briefs filed with this Court. We have used the spelling that appears in the indictment -- "Jackory." (C. 11.)

[2]Nelson was also indicted for shooting into an occupied dwelling, a violation of 13A-11-61, Ala. Code 1975, and criminal mischief, a violation of 13A-7-21, Ala. Code 1975. These charges were nolle prossed.

Rory Smith testified that he had also been charged with capital murder and that he was with Nelson at the time of the shooting. Smith said that he met Nelson in 2015 and that he and Nelson had children together. On Christmas Eve 2018, he said, Nelson called him and "she told me that some people had jumped on her and asked me would I go back and fight with her. …" (R. 631.) Smith agreed, and the two got into Nelson's silver Dodge Durango sport-utility vehicle and went to the apartments where Johnesia lived with her husband Cedrick. When they first arrived at the apartments, they drove around trying to find Johnesia's car; they could not locate it, so they left. Sometime later that night they drove back to the apartments, and Nelson found Johnesia's car. Smith said that Nelson got out of her car and used a knife to puncture all four tires on Johnesia's car. The following occurred:

> "[Prosecutor]: And did y'all leave the complex at that time?
>
> "[Smith]: No.
>
> "[Prosecutor]: Tell me what happened.
>
> "[Smith]: We turned around at the entrance and went back toward the apartment.
>
> "[Prosecutor]: What made y'all turn around?

"[Smith]: She said she had to do something, so she turned around and asked me would I shoot some shots through the window.

"[Prosecutor]: What did you say?

"[Smith]: I told her no.

"[Prosecutor]: Had you -- Did you have a gun that you were going to use to shoot shots through the window?

"[Smith]: No, I didn't have a gun.

"….

"[Prosecutor]: And the first time that you saw the gun, where was it located?

"[Smith]: In her hand.

"[Prosecutor]: And y'all were in the vehicle?

"[Smith]: Yes, ma'am.

"[Prosecutor]: And she was driving?

"[Smith]: Yes, ma'am.

"….

"[Prosecutor]: Why did you say, no, you weren't going to do it?

"[Smith]: Because I didn't have any problems with these people and I didn't want to shoot into nobody's house.

"[Prosecutor]: What did she say?

"[Smith]: She said she was going to do it.

"[Prosecutor]: What did you say?

"[Smith]: I didn't say anything.

"[Prosecutor]: So, did she drive back over to the apartment?

"[Smith]: Yes.

"[Prosecutor]: And tell me what happened step-by-step when she went back to the apartment.

"[Smith]: Well, she pulled up and just fired shots into the window, and we pulled off.

"....

"[Smith]: She reached out the window and shot with both hands (demonstrating).

"[Prosecutor]: Do you know how many shots she fired?

"[Smith]: I don't.

"[Prosecutor]: At the time that y'all were vandalizing the car, could you tell whether there were any lights on in the house?

"[Smith]: Not really. I could tell there was a TV on downstairs.

"[Prosecutor]: And when you drove back by the house when the shots were fired into there, was the TV still on?

"[Smith]: Yes.

> "[Prosecutor]: Could you see anything else going on in the house?
>
> "[Smith]: I saw a shadow moving, but that's it."

(R. 636-639.) After Nelson shot into the apartment, they drove to Nelson's house. Smith testified that he had not entered into an agreement with the State for his testimony at Nelson's trial.

Johnesia Salter testified that the victim was her younger brother, that she and Nelson had had verbal altercations in the past, and that on December 23, 2018, she and Nelson had a physical altercation. She testified that in the early morning hours of December 24, 2018, she was upstairs in her bedroom and was awakened by several gunshots. Johnesia testified that her husband "jumped up and grabbed [her] and got on top of [her] and pushed [her] to the floor." (R. 339.) Johnesia ran to the window and saw Nelson's vehicle driving away from the apartment. (R. 340.) Johnesia ran downstairs and discovered that her younger brother had been shot. She tried to take him to the hospital in her car but discovered that all the tires were "busted." (R. 341.) Johnesia telephoned 911 and performed CPR until help arrived.

Laderrius Salter testified that at the time of the shooting he was living with his sister Johnesia and her husband Cedrick. He said that

Jackory lived with his mother but had come to celebrate his birthday and had been staying with them for about a week with his other brothers. Earlier on the day before the shooting, Salter said, he left the apartment with Johnesia, Cedrick, and one of his brothers, to go to Nelson's mother's house to deliver presents to Cedrick's son. They left after delivering the presents and took Cedrick to work. Salter testified that Johnesia received an upsetting telephone call from Cedrick's mother, so they drove to Cedrick's mother's house. When they arrived, Nelson was there. Johnesia got out of the car and approached Nelson and Cedrick's mother as they were walking outside the house. Johnesia and Nelson started fighting.

> "We [Laderrius and one of his brothers] went to break it up and [Nelson] was kind of, like, holding onto my sister and I was just trying to break the fight up, to stop them from fighting. And then, that's after we broke the fight up, that's when [Nelson] ran to her car and went to go grab -- she had grabbed a purse. And I know because I actually had followed her because I seen her, like, going to the car and that's when my sister and [his brother] Kary had got in the car. So, when I seen her grab the purse, my sister was yelling come on, come on; let's go. And that's when I ran and I jumped in the car and then we screamed off."

(C. 372.) After this altercation they went shopping and then went back to Cedrick's apartment. He said that right before he heard the gunshots

he had been downstairs and his brothers were all there. One brother, Caleb, he said, was awake, and he told Caleb to cut off the lights when he went to bed. At around 2:00 a.m. he was on his bed eating when he heard six or seven gunshots. (R. 377.) Laderrius testified:

> "I instantly ran -- got up and ran out my room. And, as I was running out, that's when Cedrick and Johnesia was coming out. And then, my little brother Kary, he had ran upstairs. He had Caleb and Bug and they was going upstairs and that's when he screamed, 'Ja[ckory].' And then, that's when I ran downstairs and then I cut the kitchen light on. My sister ran to the door, opened the door to see what was going on. And then, that's when -- I cut the light on and I seen he's bleeding and that's when I was like he's bleeding, he's bleeding. Then, that's when my sister ran and tried to stop the bleeding."

(R. 377.)

Cedrick Williams testified that he and Nelson have an eight-year-old child together, that he married Johnesia in 2018, and that Nelson did not get along with Johnesia and used to make comments about her. When he went to Nelson's mother's house to deliver presents to his son, Nelson was there and "she started trying to start an argument" so he left. (R. 427.) He was with Johnesia and two of her brothers. They dropped Cedrick at work and took the car. When Cedrick got to his apartment that night he went to bed and was awakened by gunshots. He ran downstairs and found Jackory holding his neck.

David Wilson testified that at the time of the shooting he was living at the apartments and that he heard three or four gunshots and saw a "gray or silver Dodge car speeding off." (R. 453.) Wilson said that he had observed that same vehicle going through the parking lot at the apartments earlier that night.

Officer Bobby Napier of the Mobile Police Department testified that he had been dispatched to the apartments in response to an emergency 911 call and that he arrived within minutes of that call. He found bullet casings in the parking lot and bullet holes in the front window and door casing of the apartment. (R. 464.) He spoke with Johnesia and she told him that she and Nelson had had a fight and that she saw Nelson's vehicle leaving the scene after the shots had been fired into her apartment. (R. 466.)

Sergeant Nick Crepeau of the Mobile Police Department testified that he had been dispatched to the apartments in response to the 911 emergency call. When he arrived, he said, the victim had already been transported to the hospital, where he was pronounced dead at 3:25 a.m. He testified:

> "When I first arrived, I observed where fired shell casings, cartridge casings had already been identified and marked.

> There were four 9 mm cases in the parking lot. And then, inside the apartment -- well, on the face of the apartment, I observed where there was damage by gunfire. And then, inside the apartment … observed some areas in the back of the apartment where there was more damage due to gunfire and also observed some blood on the sofa that was there in the living room area."

(R. 570.) Sgt. Crepeau further testified that he reviewed the surveillance videos from the parking lot of the apartments and that a silver Dodge Durango had been seen by several cameras. He said that at 8:17 p.m. on December 23 a silver Durango pulled into the apartment complex and left at 8:21 p.m. That car was also seen at 12:27 a.m. and it exited the apartments at 12:30 a.m. The Durango was also seen at 2:13 a.m. near the area where the shooting occurred and left the apartments at 2:27 a.m., mere minutes after the shooting. (R. 591.)

Nelson and Smith were arrested shortly after the shooting, and Sgt. Crepeau conducted a search of Nelson's residence. As a result of that search, he discovered a 9 mm handgun underneath the sofa cushion and a long-blade knife in the same location. (R. 596.) Nelson was interviewed that same morning and about two hours later, he said, Nelson reached out to him to make an additional statement.

In Nelson's first statement she denied being at the scene of the shooting. Nelson later told police that she drove to the apartments and that she shot into the apartment. However, after learning that Jackory had been killed, Nelson told police that Smith was the person who shot into the apartment.

Erica Lawton, a firearms and tool-marks expert with the Alabama Department of Forensic Sciences, testified that she compared the casings and bullets that had been collected at the scene with the 9 mm handgun that had been discovered at Nelson's residence. She testified that all of the casings matched the 9 mm handgun found at Nelson's residence. (R. 730.)

Nelson testified in her own defense and said that she had been dating Smith since December 2015 and that they had children together. Smith drank a lot, she said, and they had problems in their relationship and she had had to call the police several times. (R. 809.) On "multiple occasions," she said, Smith put his hands on her neck. (R. 811.) Nelson testified:

> "The first thing that I remember, I would say [Smith] held me hostage with -- This is the first thing that I remember. I'm not saying it's the first thing that ever happened. The first thing that I really remember, we went to a beach and, on the

> way back, he would not take me home. He was driving my car. And I had a gun at that time that I purchased because of the violence from him, and he saw it in my hand and he took it from me and he held my hand on the gun and was telling me to shoot him. He would not take me home. That's the first thing I remember."

(R. 812.) Nelson said that in 2018 Smith got very upset when Cedrick was coming over to pick up his child, and he told Nelson that he was going to beat Cedrick up when he arrived. (R. 814.) Nelson said that she started having issues with Johnesia in 2018 and that Johnesia made threats toward her that she was going to beat her. (R. 821.)

Nelson then discussed the events that occurred on December 23 and 24, 2018. According to Nelson, she went to her mother's house on December 23 and Cedrick was there to give presents to their son. They had no disagreement at her mother's house, but she left to go to Cedrick's mother's house to discuss Cedrick's conduct with his mother. After she arrived, Johnesia drove up and jumped out of her car and called her "all kinds of names." (R. 833.) She and Johnesia left that house, and Nelson called Smith and went to pick him up. At around 12:00 a.m. she and Smith drove to Cedrick's apartment. She said that she only wanted to go to the apartments to ensure that they "ha[d] a fair fight." (R. 844.) Smith was driving her silver Durango vehicle and she was in the front

passenger side. Nelson testified that Smith parked the car and gave her a knife because she told Smith that she was just going to "mess with [Johnesia's] car." (R. 846.) Using the knife, she flattened the tires on Johnesia's car. The two got back into her car with Smith driving, and she asked Smith to shoot into the window of Cedrick's apartment. Nelson testified that Smith fired "multiple rounds into the apartment," that she saw no movement in the apartment, and that she had no intent to kill anyone. Nelson testified that she spoke to Sgt. Crepeau after the incident and that she was not truthful with him. Nelson testified that at the time that she spoke to Sgt. Crepeau she did not know that anyone had been killed. (R. 854.) On cross-examination, Nelson admitted that she knew that people were in the apartment at the time of the shooting. (R. 880.)

"[Nelson]: I waited until I knew where they lived.

"[Prosecutor]: And you saw the TV on?

"[Nelson]: No, I did not.

"[Prosecutor]: You didn't see the TV on?

"[Nelson]: No, I did not. I didn't look into the apartment.

"[Prosecutor]: You knew the car was there.

"[Nelson]: Yes.

> "[Prosecutor]: And that's why you said you were going to shoot high and shoot low in the windows upstairs and downstairs, right?
>
> "[Nelson]: What is why?
>
> "[Prosecutor]: You knew the car was there. You knew they were there, and that's when you said we're going to shoot high and we're going to shoot low. We're going to shoot one in the top and one in the bottom. That's what you said.
>
> "[Nelson]: Not because I knew they were there, but because I knew that's where they lived not because they were there.
>
> "[Prosecutor]: Okay. So, you knew that's where they lived and you knew they were home, right?
>
> "[Nelson]: Yes."

(R. 880.)

The jury convicted Nelson of capital murder. Because the State had previously agreed to not seek the death penalty, Nelson was sentenced to life imprisonment without the possibility of parole. This appeal followed.

Standard of Review

Although Nelson was convicted of capital murder for violating § 13A-5-40(a)(16), Ala. Code 1975, she was not sentenced to death. Therefore, this Court will not apply the plain-error standard of review to the claims raised by Nelson in her brief to this Court. See Rule 45A, Ala. R. App. P. Accordingly, before an issue may be properly considered by

this Court, Nelson was required to preserve the issue by proper objection in the circuit court.

I.

Nelson first argues that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose the entirety of Smith's statements to police. Specifically, she argues that the State failed to furnish the defense with Smith's statement that, before the shots were fired into Cedrick's apartment, Smith saw movement and a television on in the apartment. Nelson asserts that this evidence was material to the issue of Nelson's intent and was not included in Smith's statement that Nelson had been given by the State. The State argues that Nelson did not file a motion for discovery and did not object to these statements until Nelson questioned Smith on cross-examination.

The record indicates that during Smith's cross-examination, he was asked about his statements to police.

> "[Defense counsel]: Well, the statement we've been given for you, your lawyers, the district attorney, [Sgt. Nick] Crepeau, nowhere on there does it say anything that you saw a shadow in the window or that the TV was on.
>
> "[Smith]: I just told them that recently because I remembered.

"[Defense counsel]: You remembered after two-and-a-half years. So, nobody sat down and said it's real important that you knew something was going on downstairs and you need to have some testimony about that?

"[Smith]: I didn't hear you.

"[Defense counsel]: Judge, I'd like for the district attorney to produce any notes that they have or statement by him since the one that was given to us subject to this proffer agreement before I continue cross-examination.

"….

"THE COURT: On the record … Make a formal request for what it is you want, and then we'll go from there.

"[Defense counsel]: Judge, in discovery, we've been given three statements by Mr. Smith. One was between him and Detective Crepeau on December the 24, 2018, and I believe, the typed thing -- it's like it was with Miss Nelson's statement where there was some discussion, a slight break and came back. There's another statement on December the 24 at about 8:00 o'clock in the morning with Detective Nettles.

"….

"In none of those is there stuff about seeing movement and TV, none of those statements. That's the first we've heard of it. So, at some point, if he's told something different and they've got notes of that or a transcript or these other two meetings he's had with them that's different than this, I think we could have it subject to it being an inconsistent statement.

"THE COURT: Ms. Davis?

"[Prosecutor]: Your Honor, my response to that is, is that, when he came in to give his statement to law

> enforcement, that was recorded. It was transcribed. It was given to the defense attorney. We had met in preparation for trial and we had gone over what he had told law enforcement and – or what he had said at the previous meeting, but that would be, I guess, work product. I mean, it was trial preparation, and I don't think that they would be entitled to any trial preparation notes. And to be quite honest, I don't know if I even have any notes from that on top of that."

(R. 681-84.) The following discussion occurred after a short recess:

> "THE COURT: Well, what I'm going to -- what I'm going to state is, is that this has happened once before, not with me, and the judge. This is a capital case. The judge said I am not going to require prosecution's notes to be turned over. I am not going to in camera inspect them. What I am going to do is order the prosecution to make a copy of all such notes. And I think not just you, Ms. Davis. If you determine what's her name, Sylvia, or any other person that was present in that meeting, any person made any notes regarding Mr. Smith's -- whatever he stated, then I would like those to be assembled, completely copied, every page, every line, assembled and placed under seal should the appellate court desire the opportunity to review them. I do not want -- I am not going to ask you to turn them over to me or to the Defense. I'm not going to order that. I'm not going to -- I'm not going to order that they be, by 5:00 o'clock today, assembled, preserved and sealed.
>
> "[Prosecutor]: Judge, I just want it on the record I have taken no notes.
>
> "THE COURT: Okay.
>
> "….
>
> "All right. So, with that -- but [defense counsel] you're free, on cross-examination, to explore -- I assume you want to

> explore a little further that this statement has never been -- this particular statement has never been written down before, which I think you've begun and we kind of got derailed a little, but it's obviously, a subject of cross-examination and that's fine. But, for the record, your request to examine the notes is denied."

(R. 690-91.)

Also, the record reflects that Nelson did not file a motion for discovery. During pretrial preparation, Smith informed the prosecutors that he saw a television on and movement in the apartment before the shots were fired. The State asserted at trial that this statement was work product and that Nelson was aware from other sources that a television was on and that people were in the apartment before the shots were fired.

When reviewing a Brady claim, we consider the following:

> "A Brady [v. Maryland, 373 U.S. 83 (1963),] violation occurs where: (1) the prosecution suppresses evidence; (2) the evidence is favorable to the defendant and (3) material to the issues at trial. Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990); Delap v. Dugger, 890 F.2d 285 (11th Cir.1989); United States v. Blasco, 702 F.2d 1315, 1327 (11th Cir.), cert. denied, 464 U.S. 914, 104 S.Ct. 275, 276, 78 L.Ed.2d 256 (1983); Ex parte Kennedy, 472 So.2d 1106, 1110 (Ala.), cert. denied, 474 U.S. 975, 106 S.Ct. 340, 88 L.Ed.2d 325 (1985). The Supreme Court of the United States in United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (plurality opinion by Blackmun, J.), defined the standard of materiality required to show a Brady violation as follows: 'The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the

> defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.' See also Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); Stano v. Dugger, 901 F.2d at 899; Delap v. Dugger, 890 F.2d at 299; Coral v. State, 628 So.2d 954 (Ala. Cr. App. 1992); Thompson v. State, 581 So.2d 1216 (Ala. Cr. App. 1991), cert. denied, 502 U.S. 1030, 112 S.Ct. 868, 116 L.Ed.2d 774 (1992).
>
> "The same standard of materiality and due process requirements apply whether the evidence is exculpatory or for impeachment purposes. United States v. Bagley [473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)]; Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); Ex parte Womack[, 435 So.2d 766 (Ala.1983)]. 'When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within the general rule.' Giglio, 405 U.S. at 154, 92 S.Ct. at 766 (quoting Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959)). In short, due process requires the prosecution to disclose material evidence, upon request by the defense, when that evidence would tend to exculpate the accused or to impeach the veracity of a critical state's witness."

Williams v. State, 710 So. 2d 1276, 1296-97 (Ala. Crim. App. 1996).

Even assuming that the first prong of Brady was violated and that the State suppressed evidence, this Court cannot say that that evidence was material. Nelson testified that she knew that Cedrick and Johnesia were in the apartment, that Johnesia's car was parked outside that apartment, and that it was after 2:00 a.m. when the shooting occurred.

Johnesia's brothers testified that the television was on when the shooting occurred and a paramedic testified that that television was still on when they entered the apartment to render aid. It is clear from the record that Nelson knew that people were in the apartment when the shots were fired. Whether the television was on and whether those people were moving around was not material to the issue whether the apartment was occupied at the time that the shots were fired into that apartment.

> "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evince is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."

United State v. Agurs, 427 U.S. 97, 112-13 (1976).

> "'The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.' United States v. Bagley, 473 U.S. [667] at 682, 105 S.Ct. 3375 [(1985)]. The same rule applies when the State discloses Brady material in an untimely manner."

Ex parte Belisle, 11 So. 3d 323, 330-31 (Ala. 2008).

> "Tardy disclosure of Brady material is generally not reversible error unless the defendant can show that he was denied a fair trial. United States v. Gordon, 844 F.2d 1397 (9th Cir. 1988); United States v. Shelton, 588 F.2d 1242 (9th Cir. 1978), cert. denied, 442 U.S. 909, 99 S.Ct. 2822, 61 L.Ed.2d 275 (1979); Ex parte Raines, 429 So.2d 1111 (Ala.1982), cert. denied, 460 U.S. 1103, 103 S.Ct. 1804, 76 L.Ed.2d 368 (1983); McClain v. State, 473 So. 2d 612 (Ala. Cr. App. 1985). A delay in disclosing Brady material requires reversal only if 'the lateness of the disclosure so prejudiced appellant's preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial.' United States v. Shelton, 588 F.2d at 1247 (quoting United States v. Miller, 529 F.2d 1125, 1128 (9th Cir.), cert. denied, 426 U.S. 924, 96 S.Ct. 2634, 49 L.Ed.2d 379 (1976))."

Coral v. State, 628 So. 2d 954, 980 (Ala. Crim. App. 1992). "[The defendant] is not entitled to a new trial simply because having the proffer would have enabled him to more effectively prepare for trial." 11 So. 3d at 331-32.

Based on the foregoing, we cannot say that the challenged evidence was material to the issue of Nelson's guilt. Accordingly, Nelson is due no relief on this claim.

II.

Nelson next argues that the State violated her rights to a fair and impartial trial and to due process by denying her the right to question

her accomplice Smith about favorable treatment he was going to receive from the State based on his testimony at Nelson's trial.

First, there is no indication that the State promised Smith that it would recommend any specific sentence in exchange for his truthful testimony at Nelson's trial. The record indicates that the agreement between the State and Smith provided: "In return for Mr. Smith's cooperation, the State of Alabama agrees to thoroughly and honestly evaluate the information provided and, after due consideration, determine what, if any, recommendation may be made by the State of Alabama pertaining to the criminal charges against him." (C. 363.)

The State moved in limine to exclude any testimony regarding potential sentences in the case. It asserted that because the State was not seeking the death penalty any matters related to sentencing were not a proper consideration for the jury. (C. 75.) At a hearing on this motion, the circuit court stated:

> "In this particular case, because that's the only option that would be available to the Court, you know, should she be convicted of capital murder, it's very different than a case where there is a range of punishment available to a sentencing judge. And I think, certainly, in these particular facts, the full terms of the agreement are, quite frankly, probably what they are, which is that that's the reason that

> he entered into any agreement, any proffer was to avoid that sentence. Is that correct?
>
> "....
>
> "So, what I am not going to allow is any testimony regarding the death penalty because that was never -- or it was originally an option in this case, but since the State made the declaration it would not seek the death penalty, that has not been an option that Mr. Smith was looking at as punishment; therefore, I will not allow any testimony of the death penalty at all.
>
> "<u>But the full terms of the agreement, whatever they turn out to be, any questions that are very strictly limited in that regard, I will allow on cross-examination</u>. I don't want to give examples of questions. I just want the lawyers to understand that I believe that the crux of his agreement had to do with not being sentenced to life without the possibility of parole were he to be found guilty.
>
> "I don't want any reference to Miss Nelson to be in this questioning. In other words, I don't want the jury to be told in any respect that that would be a possibility of a sentence for her. Is that clear as it can be? I'm not sure exactly how to phrase that other than you can elicit the full terms of the agreement, but I don't want any mention of the death penalty and I don't want any mention of Miss Nelson in the questioning surrounding that."

(R. 97-99.) (emphasis added). At the conclusion of this hearing, the Court denied the State's motion in limine "to the extent that [Nelson was] allowed to seek the full terms of the agreement [between the State and Smith], and I'm not going to forbid you from following up on a line of

questioning." (R. 102.) Contrary to Nelson's assertions in brief, the circuit court did not prohibit Nelson from questioning Smith about any agreement that he had with the State.

During Smith's cross-examination, defense counsel questioned Smith about his prior 2014 conviction for robbery and his 10-year sentence for that conviction. (R. 645.) Counsel questioned Smith about his mental health and elicited testimony that he suffered from depression, that he was on medication for that condition, and that he had been committed to a mental facility on four separate occasions since 2011. (R. 647.) Defense counsel questioned Smith about the fact that Nelson became pregnant with his child in May 2016, that his mother petitioned to have him committed that same month, and that he had a 2016 charge for domestic violence based on harassment. The following occurred:

> "[Defense counsel]: And then -- and that was in December when the police arrested you. But then, in September of 2019, the grand jury came back and charged you with capital murder, didn't they?
>
> "[Smith]: Right.
>
> "[Defense counsel]: And, at some point, your lawyers told you, well, look, the only thing you could get for capital murder is going to be life without parole? Didn't they tell you that?
>
> "[Smith]: Yes.

"….

"[Defense counsel]: And so, you guys were faced with the dilemma if you go to trial, you get life without parole. If you go to trial and maybe get something lesser than that, you've got this prior conviction, so the Habitual Offender Act would apply to you, wouldn't it?

"….

"[Defense counsel]: Okay. But you anticipate something better than that, don't you?

"[Smith]: Not at all.

"[Defense counsel]: You don't -- you don't expect that you're going to get less than life without parole?

"[Smith]: We didn't discuss anything like that.

"[Defense counsel]: You're telling me [the two prosecutors] did not sit down and talk to you and you guys discuss you could get a lesser sentence if you come in and testify against your codefendant?

"[Smith]: Right, they didn't tell me nothing like that.

"[Defense counsel]: So you're going to plead guilty when this is over with and get life without parole?

"[Smith]: I never said I was pleading guilty.

"[Defense counsel]: What are you pleading guilty to?

"[Smith]: I'm not pleading guilty to anything.

> "[Defense counsel]: When this trial is over with, you're going to just go home?
>
> "[Smith]: I don't know.
>
> "[Defense counsel]: You anticipate something like time served, don't you?
>
> "[Smith]: Not at all.
>
> "[Defense counsel]: What do you think is going to happen to you when this trial is over after you testify?
>
> "[Smith]: Your guess is better than mine.
>
> "….
>
> "[Defense counsel]: Then, why did you testify?
>
> "[Smith]: Because it was time to do the right thing."

(R. 698-700.) Smith repeatedly told defense counsel that he had no specific agreement with the State and that he had not been promised a shorter sentence than a sentence of life imprisonment without the possibility of parole.

"'The right of cross-examination, thorough and sifting, belongs to every party as to the witnesses called against him.' Buckelew v. State, 48 Ala. App. 411, 415, 265 So. 2d 195, 198-99 (Ala. Crim. App.), cert. denied., 409 U.S. 1060, 93 S.Ct. 558, 34 L.Ed.2d 512 (1972)." Akin v. State, 698 So. 2d 228, 236 (Ala. Crim. App. 1996).

> "'The scope of cross-examination in a criminal proceeding is within the discretion of the trial court, and it is not reviewable except for the trial judge's prejudicial abuse of discretion. The right to a thorough and sifting cross-examination of a witness does not extend to matters that are collateral or immaterial and the trial judge is within his discretion in limiting questions which are of that nature. Collins v. State, [Ala. Cr. App., 364 So. 2d 368 (1978).]'"

Burton v. State, 487 So. 2d 951, 956 (Ala. Crim. App. 1984), quoting Coburn v. State, 424 So. 2d 665, 669 (Ala. Crim. App. 1982).

Smith's cross-examination was both extensive and thorough. (R. 643-718; 720-22.) Nothing in the record supports Nelson's argument that she was limited in her cross-examination of Smith concerning any agreement that Smith had with the State in exchange for his testimony. Indeed, the circuit court ruled that Nelson could question Smith about the terms of his agreement with the State. This claim is not supported by the record. For these reasons, Nelson is due no relief on this claim.

III.

Nelson next argues that the court's COVID restrictions denied her the ability to have members of her family present in the courtroom. She further asserts that the use of television monitors to show witness testimony rather than live in-court testimony denied her a fair trial.

Nelson cites many cases to support her argument; however, all the cases cited to support this claim are cases that do not address the unique circumstances presented by the COVID-19 pandemic.

The trial record shows that at a pretrial hearing the circuit court discussed the COVID protocols that would be in place for Nelson's trial. The State moved that the veniremembers wear clear face shields in lieu of masks or other coverings obstructing their faces. The circuit court noted that there was a standing order in place by the presiding judge of Mobile Circuit Court that provided for the wearing of face masks in the courthouse. The circuit court stated:

> "So, that being said, I'm not going to require face shields because I think that is in contravention of the presiding judge's order. In addition, I am not going to place the jury members -- veniremembers in a position of [being] uncomfortable -- where they are uncomfortable being at jury duty for their own health and safety. So, I'll issue an order, but I will go ahead and tell you that I will allow the venire-members to pull their masks down if they desire -- that is their choice -- and offer their answers to any questions, all right?"

(R. 82.) The prosecutor then asked about the attorneys wearing face masks and the circuit court stated that its policy was to allow the attorneys to remove their face masks when they were addressing the jury or the court. The circuit court then noted that the jury box would be

available for the victim's family representative but because of the social distancing protocol required by the COVID safeguards all the family members who wanted to attend would not be allowed in the courtroom. (R. 84.) Defense counsel then stated: "I understand with the constraints, but she has that right. A lot of it is for just moral support, what the cases say. So, if [the State's] going to have two, we'll have two -- I think the opportunity to have two. I'm not saying we will." (R. 86.) During this lengthy discussion concerning the COVID protocols, defense counsel never objected to the circuit court's manner of implementing the COVID protocols.

In brief, Nelson also argues that the use of television monitors to view the witnesses violated her right to confront her accusers. Nelson cites the following page in the record to support his contention:

> "[Prosecutor]: And, Judge, we're having some technology issues. I don't think that the jurors can see --
>
> "THE COURT: Hold on...."

(R. 710.) There is no further discussion on this issue, and nothing in the record suggests that the issue with the technology used at trial was not quickly resolved.

First, as the State correctly asserts in brief, Nelson did not object to any of the above issues in the circuit court. Accordingly, the claims are not properly preserved for appellate review. See Ex parte Coulliette, 857 So. 2d 793 (Ala. 2003), quoting Newsome v. State, 570 So. 2d 703, 717 (Ala. Crim. App. 1989) ("'Review on appeal is restricted to questions and issues properly and timely raised at trial.'"); see also State v. Blenman, 177 N.E.3d 1039, 1044-45 (Ohio Ct. App. 2021) (holding that challenge to trial court's handling of proceedings during COVID-19 pandemic was not preserved for appellate review when raised for the first time on appeal).

Moreover, the COVID protocols did not deny Nelson a fair trial. Many courts have addressed issues related to COVID restrictions.

> "Defendant contends that he was denied a fair trial by the refusal to allow his family members to be present in the courtroom during the trial. As defendant concedes, he has cited no authority establishing a right to the physical presence of his family in the courtroom. The trial court expressed sympathy for defendant's wish to have his family present to support him and boost his morale, but to protect against the spread of COVID-19 as required by the State Court Administrative Office (SCAO), the court was constrained to limit the persons allowed in the courtroom. Only the parties, lawyers, jurors, and witnesses were allowed in the courtroom. The trial was streamed on YouTube [video streaming service], and defendant's family members were free, along with other members of the public, to watch the trial that way.

> "Defendant next raises a number of complaints related to protocols for jurors, which limited his counsel's ability to observe the jurors' physical responses. First, defendant takes issue with the fact that during voir dire, potential jurors were located in a separate assembly room before being called into the courtroom for voir dire. … Defendant fails to explain how these procedures denied him a fair trial. Defendant also complains that jurors were required to wear masks and to maintain safe physical distances between each other during the trial, resulting in some jurors being seated in the portion of the courtroom normally reserved for the audience. Defendant says that his counsel could not observe the jurors throughout the trial to determine if they were paying attention, and it hindered his counsel's ability to assess jurors' responses to the evidence being presented. Defendant, however, provides no authority to dispute the trial court's observation that there is no constitutional right of confrontation with respect to jurors (as opposed to witnesses). Moreover, defendant cites no authority requiring jurors to be unmasked or to all sit together in the jury box rather than to be spread out in the courtroom. In short, defendant has provided no basis to conclude that the implementation of the contested masking and physical-distancing protocols denied him a fair trial."

People v. Bogan, (No. 355649, March 17, 2022) (Mich. Ct. App. 2022) (not reported in North Western Reporter).

> "Defendant Dunnigan argues that the COVID-19 pandemic deprived him of a fair trial. He suggests that the jury was so distracted and stressed that they convicted him just to get the trial over with.
>
> "The defendant did not raise this Sixth Amendment fair-trial argument during the trial, and he points to nothing to support his speculation that the jury acted in derogation to their solemn oath or the Court's instructions. He cites no

> authority to support his position that the COVID-19 pandemic tainted the trial or that the jury based its verdicts on anything other than the evidence presented during the trial. He ignores that the Court repeatedly instructed the jury not to consider anything other than the evidence presented during the trial.
>
> "The Court followed health and safety protocols set forth in a Western District of New York General Order regarding the COVID-19 pandemic, as well as recommendations by a COVID-19 Judicial Task Force during the trial. The defendant did not object to these protocols or to any distraction caused by the protocols during the trial. Based upon the Court's observations, the jury was generally attentive during the trial. The COVID-19 safety precautions that were followed during the trial were cumbersome, but they did not compromise the fairness of the trial or the jury's deliberations and verdicts. Defendant Dunnigan's argument that he was deprived of a fair trial by the effects of the COVID-19 pandemic is without merit."

United States v. Lloyd, [17-CR-119-A, September 1, 2021] ___ F. Supp. 2d ___, (W.D.N.Y. 2021) (footnotes omitted).

> "First, the Court agrees with the Government that Mr. Holder has waived all claims of prejudice stemming from the Court's COVID-19 protocols. This Court gave Mr. Holder the opportunity to push his trial back if he did not wish to comply with the Court's COVID-19 protocols. The Court gave Mr. Holder ample notice of what those protocols would entail, including masks worn by all individuals in the courtroom and seating jurors in the gallery to maintain 6-foot distance between individuals. Further, the Court gave Mr. Holder the exclusive right to choose whether witnesses would testify in the courtroom with a mask on or from an adjoining room, without a mask, via video teleconference. Nevertheless, Mr. Holder invoked his speedy trial rights, informed the Court

> that he wished to proceed to trial, objected to the Court's COVID-19 protocols on the record, and chose to have witnesses testify in person while wearing masks.
>
> "Even assuming Mr. Holder has not waived his arguments to COVID-19 protocols, his arguments concerning the mask mandate, jury protocols, and public access to the trial all fail on the merits."

United States v. Holder, [No. 18-cr-00381-CMA-GPG-01, September 27, 2021] ___ F. Supp. 2d ___, (D. Colo. 2021).

Nelson failed to preserve this issue for appellate review; therefore, it is not properly before this Court on appeal.

IV.

Nelson next argues that there was insufficient evidence to convict her of capital murder because, she says, the State failed to present sufficient evidence from which the jury could find that she had a specific intent to kill Jackory. In brief, Nelson also argues that the State's suppression of Brady material invaded the province of the jury's exclusive role to resolve the credibility of the evidence.

The record shows that when the State rested its case Nelson moved for a judgment of acquittal and argued that the State had failed to prove a prima facie case for "every element alleged in the indictment." (R. 747.) Nelson further argued that the State failed to prove that she

had the specific intent to kill. The State argued that the question of Nelson's intent was a question for the jury, as the sole finder of fact, to resolve. (R. 748.) The circuit court denied the motion. Nelson renewed this motion at the conclusion of the presentation of all the evidence. However, no objection was raised in the circuit court challenging the credibility of the witnesses or the credibility of testimony that had been presented at trial.

> "'"In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution."' Ballenger v. State, 720 So. 2d 1033, 1034 (Ala. Crim. App. 1998) (quoting Faircloth v. State, 471 So. 2d 485, 488 (Ala. Crim. App. 1984), aff'd, 471 So. 2d 493 (Ala. 1985)). '"The test used in determining the sufficiency of evidence to sustain a conviction is whether, viewing the evidence in the light most favorable to the prosecution, a rational finder of fact could have found the defendant guilty beyond a reasonable doubt." ' Nunn v. State, 697 So. 2d 497, 498 (Ala. Crim. App. 1997) (quoting O'Neal v. State, 602 So. 2d 462, 464 (Ala. Crim. App. 1992)). '"When there is legal evidence from which the jury could, by fair inference, find the defendant guilty, the trial court should submit [the case] to the jury, and, in such a case, this court will not disturb the trial court's decision." ' Farrior v. State, 728 So. 2d 691, 696 (Ala. Crim. App. 1998) (quoting Ward v. State, 557 So. 2d 848, 850 (Ala. Crim. App. 1990)). 'The role of appellate courts is not to say what the facts are. Our role ... is to judge whether the evidence is legally sufficient to allow submission of an issue for decision [by] the jury.' Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978)."

McGlocklin v. State, 910 So. 2d 154, 156 (Ala. Crim. App. 2005).

> "[O]n appeal, there is a presumption in favor of the correctness of the jury verdict. Saffold v. State, 494 So. 2d 164 (Ala. Cr. App. 1986). Although that presumption of correctness is strong, it may be overcome in a limited category of cases where the verdict is found to be palpably wrong or contrary to the great weight of the evidence. Bell v. State, 461 So. 2d 855, 865 (Ala. Cr. App. 1984)."

Henderson v. State, 584 So. 2d 841, 851 (Ala. Crim. App. 1988).

With these principles in mind, this Court reviews the issues raised by Nelson that concern the sufficiency of the evidence.

A.

Nelson first argues that the State failed to prove that she had a specific intent to kill necessary to support a conviction for capital murder.

This Court has long held that "no defendant is guilty of a capital offense unless he [or she] had an intent to kill." Lewis v. State, 456 So. 2d 413, 416 (Ala. Crim. App. 1984). In addressing specific intent as it relates to capital murder, this Court has stated:

> "Contrary to the appellant's claim, the lack of testimony as to the appellant's intent does not negate the existence of such intent. '[C]ircumstantial evidence alone may be sufficient in conjunction with other facts and circumstances which tend to connect the accused with the commission of the crime to sustain a conviction.' Scanland v. State, 473 So. 2d 1182, 1185 (Ala. Cr. App. 1985). Furthermore, '[i]ntent may be

> inferred from the use of a deadly weapon.' Id. The state presented evidence that the appellant fired a .25 caliber pistol at six boys standing on a street corner in Clanton, Alabama. One of those boys died, while another was severely injured. After the shootings, a .25 caliber Lorcin pistol was found in a pond and was positively identified as the murder weapon. All the gunfire on the night of the shooting came from the car in which the appellant was riding. Earlier in the evening, the appellant had gotten into an altercation with the murder victim, and, as he was leaving, the appellant stated, 'We'll be back.' See Dubose v. State, 563 So. 2d 18 (Ala. Cr. App. 1990) (a prior altercation between the defendant and the victim was evidence of specific intent to kill). This evidence was sufficient to sustain the appellant's conviction for capital murder, either as a principal or as an accomplice."

Smith v. State, 745 So. 2d 922, 933 (Ala. Crim. App. 1999).

Here, the evidence showed that the gun that killed Jackory was owned by Nelson. Smith testified that Nelson repeatedly shot her gun into the window of Cedrick and Johnesia's apartment. The gun was discovered within hours of the shooting under the sofa cushion in Nelson's residence. This gun was identified as the gun that fired the shot that killed Jackory. The testimony showed that Nelson and Johnesia had had a physical altercation earlier that day. Clearly, the evidence was sufficient for the jury to conclude that Nelson had the intent to kill when she fired into an occupied apartment and that she was guilty of capital murder. There was sufficient evidence to show Nelson's intent whether

she was convicted as an accessory or as the actual shooter. There is no reason for this Court to disturb the jury's verdict. Accordingly, Nelson is due no relief on this claim.

B.

Second, Nelson challenges the credibility of the evidence. A jury is the sole finder of fact and is free to disregard any portion of a witness's testimony. "The weight and probative value to be given to the evidence, the credibility of the witnesses, the resolution of conflicting testimony, and inferences to be drawn from the evidence are for the jury." Smith v. State, 698 So. 2d 189, 214 (Ala. Crim. App. 1996). "Any issues regarding the weight and credibility of the evidence are not reviewable on appeal once the state has made a prima facie case." Jones v. State, 719 So. 2d 249, 255 (Ala. Crim. App. 1996). "[C]redibility questions are within the exclusive province of the jury." Frazier v. State, 663 So. 2d 1035, 1037 (Ala. Crim. App. 1995). Because this Court does not reweigh the evidence, Nelson is due no relief on this claim.

C.

In her reply brief, Nelson argues for the first time on appeal that the evidence was insufficient to sustain her conviction because, she says,

the State failed to present sufficient evidence to corroborate the testimony of her accomplice, thereby, violating §12-21-222, Al. Code 1975.[3] "It is well settled that 'an appellant may not raise a new issue for the first time in a reply brief.'" L.J.K. v. State, 942 So. 2d 854, 868 (Ala. Crim. App. 2005), quoting, in part Woods v. State, 845 So. 2d 843, 846 (Ala. Crim. App. 2002).

Moreover,

> "Circumstantial evidence can show corroboration, and sufficient corroboration of an accomplice's testimony '"may be furnished by a tacit admission by the accused, by the suspicious conduct of the accused, and the association of the accused with the accomplice, or by the defendant's proximity and opportunity to commit the crime."' Arthur v. State, 711 So. 2d 1031, 1056 (Ala. Crim. App. 1996) (quoting Jacks v. State, 364 So. 2d 397, 405 (Ala. Crim. App. 1978)). …
>
> "The test for whether evidence sufficiently corroborates an accomplice's testimony '"consists of eliminating the testimony given by the accomplice and examining the remaining evidence to determine if there is sufficient incriminating evidence tending to connect the defendant with the commission of the offense."' Ex parte Bullock, 770 So. 2d 1062, 1067 (Ala. 2000) (quoting Andrews v. State, 370 So. 2d 320, 321 (Ala. Crim. App. 1979)). We have said, though, that 'when the testimony of the accomplice is subtracted, the

[3]Section 12-21-222 provides: "A conviction of felony cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient."

> remaining testimony does not have to be sufficient by itself to convict the accused.' Johnson v. State, 820 So. 2d 842, 869 (Ala. Crim. App. 2000)."

Young v. State, [Ms. CR-17-0595, August 6, 2021] ___ So. 3d ___, ___ (Ala. Crim. App. 2021).

The evidence as set out in the "Facts and Procedural History" section of this opinion clearly establishes that the State presented more than sufficient evidence to corroborate Smith's testimony and for the jury to find Nelson guilty of capital murder for shooting into an occupied dwelling and causing the death of Jackory Smith. Nelson has cited no legitimate grounds for setting aside the jury's finding of guilt in this case. For these reasons, Nelson is due no relief on this claim.

V.

Nelson next argues that the circuit court erred in failing to comply with the requirements of Rule 24.4, Ala. R. Crim. P., and continuing the motion for a new trial.

Rule 24.4, Ala. R. Crim. P., provides:

> "No motion for new trial or motion in arrest of judgment shall remain pending in the trial court for more than sixty (60) days after the pronouncement of sentence, except as provided in this section. A failure by the trial court to rule on such a motion within the sixty (60) days allowed by this section shall constitute a denial of the motion as of the sixtieth day;

> provided, however, that with the express consent of the prosecutor and the defendant or the defendant's attorney, which consent shall appear in the record, the motion may be carried past the sixtieth day to a date certain; if not ruled upon by the trial court as of the date to which the motion is continued, the motion is deemed denied as of that date, unless it had been continued again as provided in this section. The motion may be continued from time to time as provided in this section."

Nelson was sentenced on May 28, 2021, and filed a timely motion for a new trial on June 3, 2021. (C. 391-96.) On June 14, 2021, the circuit court issued an order setting the motion for a hearing on June 21, 2021. (C. 401.) The State moved that the court quash a subpoena that had been issued to an assistant district attorney for the June 21 hearing. On June 21, 2021, the circuit court issued an order setting up a briefing schedule regarding the motion to quash and setting the matter for a hearing on August 12, 2021. (C. 413.) An amended order was issued on June 22, 2021, which provided: "Having obtained the express consent of the State and Defendant, this matter is hereby reset for hearing on the motion for a new trial and motion to quash on Thursday, August 12, 2021." (C. 420.) A hearing on the motion for a new trial was held on August 16, 2021. However, nothing in the record indicates that this motion had been continued to a date certain with consent of all parties before August 12,

2021, the original date that it would be deemed denied. Thus, the motion for a new trial was denied by operation of law on August 12, 2021. Taylor v. State, 905 So. 2d 36, 40 (Ala. Crim. App. 2005).

This Court has long recognized that it is a defendant's duty to monitor the status of his or her case. That duty necessarily includes the duty to monitor the status of motions filed in the court.

> "In Ex parte Swoope, 724 So. 2d 92, 95–96 (Ala. Crim. App. 1998), we recognized the long-standing Alabama rule that a party has a duty to monitor the status of his or her case. We stated:
>
> > "'It is the policy of the judicial system of this state that an accused has a duty to monitor the status of his case. Ex parte Weeks, 611 So. 2d 259 (Ala. 1992). This policy was discussed in Hart v. City of Priceville, 631 So. 2d 301 (Ala. Cr. App. 1993):
> >
> > > " ' " '[I]t is generally held in Alabama that a party is under a duty to follow the status of his case, whether he is represented by counsel or acting pro se, and that, as a general rule, no duty rests upon either the court or the opposing party to advise that party of his scheduled trial date, see the cases collected at 18A, Ala. Digest Trial § 9(1) (1956).' Ex parte Weeks, 611 So. 2d 259, 262 (Ala. 1992). 'Generally, a party, whether represented by counsel or acting pro se, has a duty to keep abreast of the status of his case, and no duty rests on the court or opposing

> parties to advise him of the trial date.' Bowman v. Slade, 501 So. 2d 1236 (Ala. Civ. App. 1987)."'
>
> "See also Johns v. A.T. Stephens Enters., Inc., 815 So.2d 511, 515 (Ala. 2001) (' "[A]ll parties litigant, once in court, either for themselves or through their attorneys[,] must keep track of their case, [and] know [its] status...." '); Averett v. Averett, 255 Ala. 606, 610, 52 So. 2d 371, 375 (1951) (' "A litigant by his attorney must keep up with the progress of his case in court, and he is not to have notice, except as prescribed by law." '); Faust v. Faust, 251 Ala. 60, 36 So. 2d 229 (1948); Wetzel v. Birmingham Elec. Co., 250 Ala. 267, 268, 33 So. 2d 882, 882 (1948) ('As the aggressive party in the case it was plaintiff's duty to follow his case in all of its steps until finally disposed of and no duty rested upon the court or its officers or the adverse party to advise plaintiff of the setting of the case for trial.'); Thompson v. Odom, 279 Ala. 211, 184 So. 2d 120 (1966); State v. Woodham, 276 Ala. 662, 166 So. 2d 391 (1964). Alabama is not alone in recognizing this policy. See Vilsick v. Fibreboard Corp., 861 S.W.2d 659, 664 (Mo. Ct. App. 1993) ('A party has a continuing duty to monitor a case from the filing of the case until final judgment.'); Blichert v. Brososky, 436 N.E.2d 1165, 1168 (Ind. Ct. App. 1982) ('When an attorney appears in court for a client, it becomes his duty to keep advised of the progress of the case.'); Oklahoma Bar Ass'n v. Braswell, 663 P.2d 1228 (Okla. 1983) (attorney has duty to monitor status of case)."

Ex parte Maples, 885 So. 2d 845, 848-49 (Ala. Crim. App. 2004).

It was Nelson's responsibility to monitor the status of her motion for a new trial. Moreover, for the reasons stated in this opinion, that motion, although denied by operation of law, would have been properly denied. Accordingly, Nelson is due no relief on this claim.

VI.

Nelson next argues that the circuit court erred in several of its rulings that the court made during the course of her capital-murder trial. We will address each claim individually.

A.

Nelson alleges several errors on the part of the circuit court in instructing the jury at the conclusion of the evidence.

First, Nelson argues that the circuit court erred in failing to give requested jury instructions on criminally negligent homicide. The record shows that at the conclusion of the circuit court's instructions to the jury Nelson made four objections. However, none of those objections were that the court erred in failing to instruct the jury on criminally negligent homicide. Thus, this issue is not properly before this Court.

> "The defendant must object to the failure to issue a requested jury instruction before the jury retires to deliberate in order to preserve that argument for appellate review. See Davis v. State, 747 So. 2d 921, 924 (Ala. Crim. App. 1999) (holding that, to preserve an issue concerning jury instructions for appellate review, the defendant is required to object specifically to the contested charge)."

Miller v. State, 264 So. 3d 907, 911 (Ala. Crim. App. 2017).

Second, Nelson argues that the circuit court erred in failing to give defense counsel's requested jury instructions numbered 7, 9, and 13. However, the record does not include copies of Nelson's requested jury instructions. It is impossible for this Court to review this claim when there is nothing in the record that shows the content of the requested charges.

> "[A]s we previously said, 'where the appellant fails to include pertinent portions of the proceedings in the record on appeal, this court may not presume a fact not shown by the record and make it a ground for reversal.' Carden [v. State, 621 So. 2d 342, 345 (Ala. Crim. App. 1992)]. It is the appellant's duty to provide this court with a complete record on appeal, and we will not predicate error on a silent record. See Wilson v. State, 727 So. 2d 869 (Ala. Cr. App. 1998). '"Where the record is silent on appeal, it will be presumed that what ought to have been done was not only done but was rightly done."' Jordan v. City of Huntsville, 667 So. 2d 153, 156 (Ala. Cr. App. 1995), quoting Stegall v. State, 628 So. 2d 1006, 1009 (Ala. Cr. App. 1993)."

Gamble v. State, 791 So. 2d 409, 419-20 (Ala. Crim. App. 2000).

Third, Nelson asserts that the circuit court should have given the instruction she requested on circumstantial evidence. At trial, the following occurred:

> "[Defense counsel]: In particular, you said you were going to give one paragraph in our requested charge number eight.
>
> "THE COURT: I did. I put it --

> "[Defense counsel]: I may have missed you giving that. It dealt with circumstantial evidence.
>
> "THE COURT: I put it right behind -- I made myself a note where I put it in, and so I did read it. I read it right behind this, direct and circumstantial."

(R. 1036.) The circuit court stated that it gave that portion of the charge on circumstantial evidence that Nelson had requested. Thus, Nelson has no adverse ruling from which to appeal. "A defendant must receive an adverse ruling to preserve an objection for review on appeal." S.A.J. v. State, 195 So. 3d 327, 342 (Ala. Crim. App. 2015).

Next, Nelson asserts that the circuit court should have given her requested instruction on the credibility of a witness who is "using addictive drugs or failing to take prescribed medication for mental illness during the period of time they're testifying about." (R. 1037.) The Court noted that it did not give this instruction because Nelson failed to provide any legal basis for that charge. Indeed, this Court can locate no caselaw that addresses the validity of a similar jury instruction. The circuit court thoroughly instructed the jury on the credibility of witnesses.

> "A trial court has broad discretion when formulating its jury instructions. See Williams v. State, 611 So. 2d 1119, 1123 (Ala. Cr. App. 1992). When reviewing a trial court's instructions, ' "the court's charge must be taken as a whole,

> and the portions challenged are not to be isolated therefrom or taken out of context, but rather considered together." ' Self v. State, 620 So.2d 110, 113 (Ala. Cr. App. 1992) (quoting Porter v. State, 520 So.2d 235, 237 (Ala. Cr. App. 1987)); see also Beard v. State, 612 So.2d 1335 (Ala. Cr. App. 1992); Alexander v. State, 601 So.2d 1130 (Ala. Cr. App. 1992)."

Williams v. State, 795 So. 2d 753, 780 (Ala. Crim. App. 1999). For the above reasons, Nelson is due no relief on this claim.

B.

Next, Nelson argues that the circuit court abused its discretion by excluding Nelson from a pretrial hearing on a motion to set, reduce, or amend bond.

The record reflects that a motion for bond was filed on November 8, 2019. That motion was denied on December 16, 2019. Nelson filed another Motion for Bond on March 31, 2020. The record further reflects that on April 2, 2020, a hearing occurred "virtually, due to quarantine" as a result of the COVID-19 pandemic. (R. 59.) The prosecutor and defense counsel were present. No witnesses testified, nor did Nelson's counsel object to Nelson not appearing at the virtual hearing. Both defense counsel and the prosecutor argued the issue of Nelson being given bail even though she had been charged with a capital offense. The State had indicated before this hearing that it would not seek the death

penalty. The circuit court did not issue a ruling at this hearing and indicated that it was going to research the issue.

A few days later, the circuit court issued the following order:

> "This matter is before the Court on [Nelson's] motion to set/reduce/amend bond. The Court conducted a virtual hearing on Thursday, April 2, 2020. Present online for the hearing were Keith Blackwood, counsel for State of Alabama; Jeff Deen and Tom Wood, counsel for [Nelson]; and Jerri Garside, Official Court Reporter. Due to COVID-19 orders/recommendations by the Governor of the State of Alabama and the Chief Justice of the Alabama Supreme Court, [Nelson] was not present.
>
> "The Court reviewed all filings and heard arguments from counsel for the State and [Nelson]. Having considered the arguments, it is hereby ordered that [Nelson's] motion is denied."

(C. 56.) Another motion for bond was filed on January 29, 2021. (C. 64-66.) Nelson also filed a pro se Motion for Bond on February 24, 2021. A hearing was held on this motion in March 2021 and the motion was later denied by the circuit court. (C. 74.)

The Alabama Supreme Court in Ex parte DeBruce, 581 So. 2d 624 (1994), addressed the effect of a capital defendant's absence from a pretrial hearing where various motions had been discussed. The Court stated:

"DeBruce, of course, has a substantive right to be present, either in person or by counsel, or both, at several stages in a criminal proceeding. The question presented here is whether he was entitled to be present at the pretrial hearing in this case. We hold that DeBruce was not prejudiced by his absence from the pretrial hearing, and in reaching this conclusion we are persuaded by reasoning used in several federal cases construing a Federal Rule of Criminal Procedure that is substantially similar to Rule 9 of the Alabama Rules of Criminal Procedure, which we believe is controlling here.

"….

"Rule 9 specifically addresses these rights of a defendant. Rule 9.1, Ala. R. Crim. P., states, in part, that "[t]he defendant has the right to be present at the arraignment and at every stage of the trial, including the selection of the jury, the giving of additional instructions pursuant to Rule 21, the return of the verdict, and sentencing.

"How should the words 'the trial' in Rule 9.1 be interpreted in a capital case where the right of a defendant to be present cannot be waived? We have examined some of the records surrounding this Court's adoption of Rule 9, and we think this Court intended the words 'the trial' to refer to the proceedings beginning at the time the trial commences and should be construed in pari materia with the provisions of Rule 19, Ala. R. Crim. P., 'Trial.' Our construction of these words seems to be consistent with the construction of Rule 43, Fed. R. Crim. P., which contains similar wording.

"….

"Federal Courts that have been called upon to construe Rule 43, Fed. R. Crim. P, which reads substantially like our Rule 9, have come to the same conclusion that we have reached. In United States v. Gradsky, 434 F.2d 880 (5th

Cir.1970), cert. denied, sub nom. Roberts v. United States, 401 U.S. 925, 91 S.Ct. 884, 27 L.Ed.2d 828 (1971), and Gradsky v. United States, 409 U.S. 894, 93 S.Ct. 203, 34 L.Ed.2d 151 (1972), after the defendants were convicted for multiple violations of federal law, evidentiary hearings were conducted to determine whether their convictions were tainted by illegal wiretaps. The trial court found no evidence of taint and ordered the convictions reinstated. The defendants filed motions to vacate and set aside the order, alleging that their presence had been required at evidentiary hearings. The district court determined that the defendants' constitutional rights had not been infringed upon by their absence from the evidentiary hearings, and it denied motions to vacate and set aside the order. The defendants appealed. The Court of Appeals (Ingraham, Circuit Judge) held that where the defendants were represented by a competent attorney at the evidentiary hearings, and the attorney felt that the defendants' presence was unnecessary, and the attorney had an ample opportunity for cross-examination, and there was no showing that the defendants suffered prejudice by their absence, the defendants' constitutional rights were not violated by their absence and any possible error in their absence from the hearings did not affect their substantial rights.

"….

"In United States v. Hanno, 21 F.3d 42 (4th Cir. 1994), the defendant's jury was 'dismembered' in his absence and without his having been given notice. The court held that this was a violation of the defendant's due process right to be present under the Constitution and Fed. R. Crim. P. 43(a). The court held that 'an accused "has a [constitutional] right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings,"' citing Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 2533, 45 L.Ed.2d 562 (1975). The Hanno court noted that in United States v. Camacho, 955 F.2d 950, 952 (4th Cir. 1992), the Camacho

> court had concluded that a defendant had such a right under the Constitution and Rule 43(a) to be present during the empaneling of a jury and the Hanno court said it could see no reason to distinguish between facts regarding the 'dismemberment' of the jury in Hanno and the facts of Camacho, and wrote, '"Convening a criminal tribunal without the presence of the defendant treads precariously close to the concept of trial in absentia, which our system has long disdained." Camacho, 955 F.2d at 953, quoting United States v. Alikpo, 944 F.2d 206, 209 (5th Cir. 1991).' 21 F.3d at 47.
>
> "After thoroughly considering the purposes of Rule 9 and the provisions of the State and Federal Constitutions relating to a defendant's right to be present, and after carefully examining the record made during the trial court's consideration of the various motions, we are convinced that the trial judge did not violate any right of the defendant as guaranteed by the provisions of Rule 9, or by either the State or the Federal Constitution."

651 So. 2d at 629-35.

Based on the Alabama Supreme Court's reasoning in Ex parte DeBruce, we cannot say that Nelson's absence from one of her hearings on bond violated any of her constitutional rights or resulted in any prejudice to Nelson. Accordingly, Nelson is due no relief on this claim.

C.

Nelson next argues that the circuit court erred in overruling her objection to the State's questioning the venire regarding the weight it would attach to Nelson's testimony if she chose to testify.

The following occurred during the voir dire of the prospective jurors:

> "[Prosecutor]: The Defendant in this case has an absolute right not to testify. However, she may choose to testify. Does everyone understand that if the Defendant does choose to testify, that her testimony is not entitled to any more weight than any of the other witnesses solely because she is the one that's on trial?
>
> "(No audible response.)
>
> "[Prosecutor]: Does anyone believe that the Defendant's testimony is more likely to be --
>
> "[Defense counsel]: Judge, I'm going to object to this, object to this line of questioning.
>
> "THE COURT: Overruled. Let's move on."

(R. 171.)

"The legal standard to be applied as regards voir dire questioning of the venire is the sound discretion of the court. The court determines how far counsel may go in asking questions of the jury on voir dire. The nature, the variety, and the extent of the questions are left to the trial court...." Dawkins v. State, 455 So. 2d 220, 222 (Ala. Crim. App. 1984). "During voir dire, the State may mention the defendant's constitutional privilege against self-incrimination to the jurors and then inquire into the weight jurors will give to the defendant's testimony if he decides to testify." State v. Gray, 235 So. 3d 1270, 1280 (La. App. 5th Cir. 2017).

"The question posed … was simply an inquiry into whether the jury would give [the defendant's] testimony the same weight as any other witness's testimony, should he decide to testify. We see nothing ominous in that." Manning v. State, 835 So. 2d 94, 98 (Miss. Ct. App. 2002).

There was no error in allowing the State to question the prospective jurors about the credibility that they would attach to Nelson's testimony if Nelson chose to testify. Therefore, Nelson is due no relief on this claim.

D.

Nelson next argues that the circuit court erred in overruling his objection to the admission of State's Exhibit 249, Nelson's statement to law enforcement. She further asserts that that this error was compounded because, she says, there was no proper predicate for its admission.

The record indicates that Nelson moved that her statement be suppressed because, she argued, it had been taken in violation of Miranda v. Arizona, 384 U.S. 436 (1966), and was involuntary. (C. 38.) A hearing was held on the motion. (R. 27-58.) At the suppression hearing, Sgt. Crepeau testified that he had been assigned to investigate the murder and that he spoke to Nelson on December 24, 2018. This

statement was videotaped and audiotaped and he read Nelson her Miranda rights. Sgt. Crepeau testified:

> "So, after I had got personal information from her such as name, date of birth, where she lived, things of that nature, there was a paragraph here -- I say, 'Okay, India. Um, so, we want to talk with you, ask you some questions, okay? And, but what I will do is read Miranda rights to you first, okay, and then we'll go from there. So, I will read these to you and then if you don't understand any part of this, make sure you ask me, you know, to further explain it if necessary, okay?' She replied, 'uh-huh.' And then, I said 'all right, India. You have the right to remain silent. Anything you say can and will be used against you in court. You have the right to talk to a lawyer and have one present with you while you're being questioned.' If you can -- if you cannot … afford to hire a lawyer, one will be appointed to represent you before questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements, okay? And I then asked her did she understand that and she says, 'Uh-huh.' "

(R. 35-36.) Nelson did not appear to be under the influence of drugs or alcohol at the time that she gave her statement to police, Sgt. Crepeau said.

Nelson also testified at the suppression hearing. She said that she did not fully understand the extent of her rights, that she felt coerced, that Sgt. Crepeau did not threaten her, and that she had smoked marijuana before giving her statement.

At the conclusion of the hearing, the circuit court stated that it was going to take the motion to suppress under advisement after it had examined the videotape of the statement. (C. 49.) A month later, the circuit court issued an order denying Nelson's motion to suppress. (C. 50.)

During trial, Sgt. Crepeau testified that Nelson gave a statement to police, that he read her Miranda rights, and that she voluntarily waived those rights and made a statement.[4] The State moved to admit the statement into evidence, and defense counsel argued that no proper predicate had been established for its admission. (R. 600.) The circuit court overruled that objection and State's Exhibit 249 was admitted into evidence.

In Nelson's first statement to police, she denied being at the scene of the shooting. Nelson later told police that she did drive to the apartments and that she shot into the apartment. At trial, Nelson admitted to the accuracy of these statements during her testimony and

[4]"This Court may consider the evidence at trial as well as the evidence presented at the suppression hearing when ruling on the voluntariness of a confession." Smith v. State, 797 So. 2d 503, 526 (Ala. Crim. App. 2000).

said that she made those statements before she learned that Jackory had been killed. However, after learning of Jackory's death, Nelson testified, she told police that Smith was the person who shot into the apartment. (R. 855.)

> "The general rule is that a confession or other inculpatory statement is prima facie involuntary and inadmissible and the burden is on the State to prove by a preponderance of the evidence that such a confession or statement is voluntary and admissible. See, e.g., Ex parte Price, 725 So. 2d 1063 (Ala. 1998). To prove voluntariness, the State must establish that the defendant 'made an independent and informed choice of his own free will, that he possessed the capability to do so, and that his will was not overborne by pressures and circumstances swirling around him.' Lewis v. State, 535 So. 2d 228, 235 (Ala. Crim. App. 1988). If the confession or inculpatory statement is the result of custodial interrogation, the State must also prove that the defendant was properly advised of, and that he voluntarily waived, his Miranda rights. See Ex parte Johnson, 620 So. 2d 709 (Ala. 1993), and Waldrop v. State, 859 So. 2d 1138 (Ala. Crim. App. 2000), aff'd, 859 So. 2d 1181 (Ala. 2002)."

Eggers v. State, 914 So. 2d 883, 898-99 (Ala. Crim. App. 2004). "The Supreme Court has stated that when a court is determining whether a confession was given voluntarily it must consider the 'totality of the circumstances.'" McLeod v. State, 718 So. 2d 727, 729 (Ala. 1998).

There is nothing in the record that suggests that Nelson's statements to police were improperly admitted. Indeed, Nelson admitted

the accuracy of her statements to police during her testimony at trial. For these reasons, Nelson is due no relief on this claim.

VII.

In Nelson's reply brief, she argues for the first time that the cumulative errors that occurred at her trial constitute reversible error. As previously stated, an appellant may not raise new issues in their reply brief. L.J.K. v. State, 942 So. 2d 854, 868 (Ala. Crim. App. 2005).

Moreover,

> "To the extent that [the appellant] argues that these alleged individual errors resulted in cumulative error that required a reversal of his conviction, ' " '[b]ecause we find no error in the specific instances alleged by the appellant, we find no cumulative error.' Lane v. State, 673 So. 2d 825 (Ala. Crim. App.1995). See also McGriff v. State, 908 So. 2d 961 (Ala. Crim. App. 2000)." Calhoun v. State, 932 So. 2d 923, 974 (Ala. Crim. App. 2005).' Harris v. State, 2 So. 3d 880, 928 (Ala. Crim. App. 2007), cert. denied, 555 U.S. 1155, 129 S.Ct. 1039, 173 L.Ed.2d 472 (2009)."

Revis v. State, 101 So.3d 247, 325 (Ala. Crim. App. 2011). The same is true in this case.

For the foregoing reasons, we affirm Nelson's conviction for capital murder and her sentence of life imprisonment without the possibility of parole.

AFFIRMED.

Cole, J., concurs. McCool and Minor, JJ., concur in the result.

Windom, P.J., recuses herself.